

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34920

ALISHA ANN MURPHY,)	2009 Unpublished Opinion No. 429
)	
Petitioner-Appellant,)	Filed: April 17, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. John K. Butler, District Judge.

Order of the district court dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Alisha Ann Murphy appeals the district court's dismissal of her application for post-conviction relief. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

The factual and procedural history of this case is set forth in *Murphy v. State*, 143 Idaho 139, 143-44, 139 P.3d 741, 745-46 (2006), as follows:

In the underlying criminal case, Murphy was convicted of first degree murder. The state's evidence indicated that on the night of December 18, 1995, Murphy entered the room of her children and began choking her seven-year-old son, Jimmy, with a belt. James, her husband, intervened and they began to argue. The argument continued in the kitchen, and Murphy knocked her husband unconscious with a cast-iron frying pan. Murphy then obtained a gun from a bedroom and returned to the kitchen. According to Jimmy's trial testimony, Jimmy observed his mother kneeling over his father's motionless body and

placing a gun into James' hand. She appeared to be pointing the gun in the direction of his father's face. Jimmy ran back to his room and then he and his four-year-old sister, Olive, heard a loud noise. Murphy gathered the children and they walked through the kitchen where James' body was lying on the floor, exited the house and drove away.

It is undisputed that Murphy and her husband were involved in a turbulent relationship marked by excessive alcohol use and physical violence. Both were extremely intoxicated on the night in question. Murphy always maintained her innocence, claiming her husband committed suicide. According to Murphy, as the fight escalated she grabbed her two children and fled the house as she had done so many times before. This version of the events was corroborated by Jimmy's initial statements to the police that he saw his father waving to them from the doorway of the house as they drove away. Murphy also insisted that after she left, her husband recorded a telephone message on the answering machine of Norma Jo Robinson, Murphy's mother,¹ proving that he was still alive. Finally, the autopsy report prepared at the time by pathologist, Dr. Kerry Patterson, listed the manner of death as indeterminate.

Several years later, Jimmy changed his story. Jimmy said that his mother had threatened to hurt him if he did not tell the police about seeing his father waving at the door. With this additional evidence, Murphy was charged with the murder of her husband. In December 1999, before the grand jury, the state's expert, Dr. Patterson, testified consistent with his autopsy report, that the manner of death was indeterminate.

Murphy's trial counsel advised her to use a "battered woman syndrome" defense, which she rejected because she refused to admit to committing the fatal act. Murphy also rejected her counsel's recommendation to accept a reduced voluntary manslaughter charge offered by the state. Then, on the eve of the trial - in September of 2000, more than four years after James' death -- Dr. Patterson, changed his opinion about the manner of death from "indeterminate" to "homicide" after examining for the first time the gun involved and the gunshot residue report. Dr. Patterson's position at trial regarding the manner of death was contrary to his autopsy report rendered three days after the death of James and contrary to his testimony before the grand jury. Defense counsel moved for a mistrial but did not request a continuance based on this change of position. At the conclusion of the trial, the jury returned a verdict of guilty. The district court imposed a life sentence with no possibility of parole. We affirmed Murphy's conviction and sentence. *State v. Murphy*, Docket No. 27853 (January 8, 2003) (unpublished).

Murphy subsequently filed a *pro se* application for post-conviction relief, raising numerous claims involving ineffective assistance of counsel, police misconduct, prosecutorial misconduct, and judicial misconduct, and incorporating a motion to amend the application upon completion of discovery. The district court appointed counsel and issued a notice of intent to dismiss Murphy's

¹ The voice on the answering machine audio tape said "Forgive me. I don't have nothin' to say to nobody. Pick up the kids tomorrow"

application. Post-conviction counsel responded to the court's notice by filing a memorandum and affidavits from Murphy and her trial counsel.

The court summarily dismissed all of Murphy's claims except an ineffective assistance of counsel claim relating to the testimony of Dr. Patterson and trial counsel's failure to obtain a forensic pathologist to aid the defense. The state filed a motion for summary dismissal, supported by another affidavit from Murphy's trial counsel. The court then vacated its prior summary dismissal order and directed Murphy to respond to the state's motion.

Murphy's post-conviction counsel responded by filing a motion seeking funds to retain an independent forensic pathologist to fully review the reports in the underlying criminal matter, including but not limited to James' autopsy report, the gunshot residue report, Dr. Patterson's pathology reports, and all other relevant evidence and related trial testimony. The district court denied Murphy's request for funds to retain a pathologist and granted the state's motion for summary dismissal.

This Court affirmed in part, reversed in part, and remanded the case to the district court for further proceedings. *Murphy*, 143 Idaho 139, 139 P.3d 741. The Court affirmed the district court's summary dismissal of several of Murphy's claims, including claims of ineffective assistance of counsel regarding (1) counsel's failure to present evidence of the alleged telephone message left by James on Murphy's mother's answering machine, and (2) counsel's failure to pursue dismissal of a juror. *Id.* at 149-51, 139 P.3d at 751-53. The Court reversed the summary dismissal of several other claims holding that notice of the grounds for dismissal had not been given. *Id.* at 150-51, 139 P.3d at 752-53. Of relevance to the present appeal, the Court reversed the district court's summary dismissal of Murphy's ineffective assistance of counsel claim relating to trial counsel's failure to hire a pathologist to aid the defense and remanded the case with instructions to either appoint or grant funds to obtain a forensic pathologist to review Murphy's claim. *Id.* at 151, 139 P.3d at 753.

Upon remand, the district court entered an order providing funding for Murphy to retain an independent forensic pathologist and ultimately approved Dr. Todd Cameron Grey.² Dr. Grey submitted a written report wherein he challenged Dr. Patterson's credentials, methodology, and the degree of certainty to which he expressed his opinion that James Murphy was the victim of a homicide. Dr. Patterson subsequently submitted a rebuttal report addressing Dr. Grey's concerns

² The district court also provided notice of its intent to dismiss those claims that this Court had determined were summarily dismissed without notice. Murphy did not respond, and the district court dismissed the claims identified in its notice of intent to dismiss. That decision is not at issue in this appeal.

and maintaining his opinion that James Murphy had been the victim of a homicide. Dr. Grey then submitted a second report.

The district court ultimately granted Murphy an evidentiary hearing to address her remaining post-conviction claims, including claims of ineffective assistance of counsel for failure to (1) retain a forensic pathologist, (2) retain a gunshot residue expert, (3) retain a blood spatter expert, (4) investigate mobile phone records, and (5) find a juror. At the evidentiary hearing, counsel for Murphy waived all claims except the claim relating to her trial counsel's failure to retain a forensic pathologist.³ No evidence was presented to the district court in the form of testimony. Rather, both parties stipulated that the court could consider the reports of Drs. Grey and Patterson, as well as the grand jury and trial testimony of the underlying criminal case. The parties did present extensive argument at the evidentiary hearing after which the district court entered a written order denying post-conviction relief as to Murphy's remaining claim.

The district court concluded that: (1) the decision of Murphy's trial counsel to not consult a forensic pathologist prior to trial was reasonable "given the fact that Dr. Patterson's opinion as to the manner of death was indeterminate until the day he testified"; (2) considering the record as a whole, even if Dr. Grey had testified and his testimony had been considered by the jury, the outcome of the trial would not have been different; and (3) the failure of Murphy's trial counsel to request a continuance, after it became clear that Dr. Patterson's opinion would change, i.e. from indeterminate to homicide, was not prejudicial under the *Strickland*⁴ standard based on the proposed testimony of Dr. Grey.

Murphy timely appealed, contending that the district court erred in dismissing her claim of ineffective assistance of counsel because she proved, by a preponderance of the evidence, that her trial counsel was deficient in not retaining a forensic pathologist and not requesting a continuance, and that, but for these deficiencies, there was a reasonable probability that the outcome of the trial would have been different.

³ Despite the waiver, the district court, in order to establish a complete record, addressed and denied each of the other claims. These claims are not at issue in this appeal.

⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

II. STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. Idaho Code § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

A. Factual Findings of the District Court

Murphy contends that the following factual findings of the district court were clearly erroneous: (1) "It should be noted that at no time does Dr. Grey himself express any opinion as to the manner of death, i.e. suicide v. homicide. Nor does he express the opinion that the manner of death is indeterminate"; (2) "It also appears to the court that Dr. Grey in his criticism of Dr. Patterson has isolated certain statements of Dr. Patterson's trial testimony and has not considered his testimony as a whole"; and (3) "the presence of gun shot residue (GSR) only on the palms of the hands of James Murphy is inconsistent with the theory of suicide." We will review each of these contentions but will not disturb the lower court's findings unless they are clearly erroneous. Idaho Rule of Civil Procedure 52(a); *Russell*, 118 Idaho 65, 794 P.2d 654.

Murphy first claims that the district court's finding that Dr. Grey did not express his own opinion as to the manner of death is clearly erroneous. Murphy argues that while "Dr. Grey was not as explicit as he perhaps could have been, he nevertheless made it clear that his opinion was that the manner of Mr. Murphy's death was indeterminate." Murphy further argues that while Dr. Grey did not explicitly express an opinion of "indeterminate," it is "undeniably *implied*" in both of Dr. Grey's reports (emphasis in original). Although Murphy recognizes that a "conclusion of 'indeterminate' manner of death is an opinion in and of itself," she argues that

because Dr. Grey could not conclude that the manner of death was a suicide or a homicide, his opinion must then be indeterminate.

Dr. Grey did not render an express opinion that the cause and manner of death was indeterminate. In Dr. Grey's first report, he stated:

In summary, based on the evidence I have reviewed, it is my *opinion* that the testimony of Dr. Patterson was extremely prejudicial to the defendant, offering a wide variety of conclusions and opinions indicating the deceased was a victim of homicide, and that his testimony was fraught with error, inaccuracy and misrepresentation. It is also my *opinion* that if the defense had been able to consult a knowledgeable and experienced forensic pathologist of their own at the original trial, much of the nonsense offered by Dr. Patterson could have been refuted.

(emphasis added). Furthermore, Dr. Grey reiterated his opinion in his second report, stating:

As I originally stated, I can not exclude the possibility that Dr. Patterson's opinion that the victim was shot by another person is not correct. My report focused on the errors, inaccuracies and misinterpretations that left the jury with the impression that the pathologic evidence proved this interpretation. I also concluded that if the defense had been able to consult a knowledgeable and experienced forensic pathologist of their own who could have provided rebuttal testimony at trial, the jury would have had a better chance of understanding the significant limitations of Dr. Patterson's testimony. Nothing in the response I have reviewed changes my opinion.

(emphasis in original). The only opinions that are expressly stated by Dr. Grey speak to the degree of certainty with which Dr. Patterson made his conclusions. Dr. Grey testified that the manner of death could be homicide or could be suicide. Dr. Grey did not render an opinion as to the manner of death to a reasonable degree of medical certainty, although he believed it to be suicide or homicide. Therefore, the district court's finding that Dr. Grey did not express his own opinion to a reasonable degree of medical certainty as to the cause and manner of James Murphy's death was not clearly erroneous.

Murphy next contends that the district court's finding that Dr. Grey isolated certain statements of Dr. Patterson's testimony rather than considering it as a whole is clearly erroneous. To support her argument, Murphy cites to the various criticisms that Dr. Grey made of Dr. Patterson's testimony, i.e. nature of the wound, range of fire, level of consciousness, etc. However, Murphy does not directly contest any of the specific findings that the court made with regard to Dr. Grey's criticisms of Dr. Patterson's testimony. Furthermore, it is clear that the

district court considered all of Dr. Patterson's testimony and concluded that Dr. Grey had taken certain statements out of context. Murphy was correct that the overall theme of Dr. Grey's reports is that Dr. Patterson could not opine, with the degree of certainty that he did, that James Murphy was the victim of a homicide. However, this does not negate the fact that Dr. Grey did take certain statements of Dr. Patterson's out of context. Therefore, the district court's finding was not clearly erroneous.

Finally, Murphy contends that the district court clearly erred in finding that Dr. Grey indicated in his report that the presence of gunshot residue only on the palms of James Murphy's hands would be *inconsistent* with the theory of suicide. Dr. Grey actually stated:

I agree that if one accepts that the sampling, evidence handling and testing for GSR was performed appropriately and according to standards, if residue was present only on the right and left palms, it would be *atypical* for suicide and that the more likely pattern is residue on the back of at least one hand.

(emphasis added). The district court, in its findings of fact, stated:

The Gun Shot Residue (GSR) Reports at trial established that James Murphy only had GSR on the palms of the right and left hands. No GSR was found on the back of his hands. Dr. Grey states that if the sampling, handling, and testing for GSR was done appropriately and according to standards, such a finding of GSR only on the palms of the decedent's hands would be *inconsistent* with the theory of suicide. If the gun was discharged by the decedent, one would expect to find GSR on the back of at least one hand. There is no evidence that the GSR was not properly collected, sampled, handled, or tested.

(emphasis added). It is clear from this Court's reading of the district court's opinion that the use of the word "inconsistent" was meant to be synonymous with "atypical." While we recognize that these words are not always interchangeable, Murphy's semantical challenge is unconvincing. Furthermore, we note that Murphy's counsel at the evidentiary hearing used the exact term for which the district court is now being criticized on appeal.⁵

⁵ In response to questioning by the district court, Murphy's counsel stated:

With the limitations that the court imposed, if the court assumes that all the evidence was appropriately collected, then Dr. Grey's going back to the palm and the gunshot residue, yes, Dr. Grey does say that in the second report, that if it's on the palms, unless there is something else that happens, it would be *inconsistent* with suicide.

(emphasis added).

III.

INEFFECTIVE ASSISTANCE OF COUNSEL

The constitutional right of a criminal defendant to counsel, as guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 13 of the Idaho Constitution, is a right to more than the mere presence of a lawyer at trial; it is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992); *Aragon v. State*, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland*, 466 U.S. 668, 687-88; *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon*, 114 Idaho at 760, 760 P.2d at 1176. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

A. Deficient Performance

This Court in *Murphy* set forth the applicable legal standards for a determination of whether trial counsel's performance is deficient:

It is well established that we will not attempt to second-guess trial counsel's strategic decisions unless those decisions are made upon the basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *State v. Perez*, 99 Idaho 181, 184-85, 579 P.2d 127, 130-31(1978); *State v. Tucker*, 97 Idaho 4, 10, 539 P.2d 556, 562 (1975). Inadequate preparation prior to trial may be sufficient to show deprivation of the right to effective assistance of counsel. *Tucker*, 97 Idaho at 10, 539 P.2d at 562. Strategic choices made after incomplete investigations are reasonable only so far as reasonable professional judgments support the limitations on investigation. *Wiggins v. Smith*, 539 U.S. 510, 533 (2003); *see also Rompilla v. Beard*, 545 U.S.

374, ___, 125 S. Ct. 2456, 2463 (2005) (failure to investigate material relied upon by prosecution was unreasonable); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (unreasonable failure to conduct thorough investigation); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (limited investigation reasonable where counsel interviewed all known witnesses and uncovered double edge of much more harmful than helpful information); *Darden v. Wainwright*, 477 U.S. 186 (1986) (double edge information justifies limited investigation); *Mitchell v. State*, 132 Idaho 274, 280, 971 P.2d 727, 733 (1998) (“The duty to investigate requires only that counsel conduct a reasonable investigation.”); *State v. Bingham*, 116 Idaho 415, 425-26, 776 P.2d 424, 434-35 (1989) (reasonable not to employ expert witness where counsel did not need help to impeach change of opinion by victim’s doctor and sought to avoid double edge of expert being cross-examined). We recognize that a defendant’s lawyer does not always have a duty to consult experts when the government is proposing to put on expert witnesses. “There may be no reason to question the validity of the government’s proposed evidence or the evidence may be so weak that it can be demolished on cross-examination.” *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001).

The American Bar Association (ABA) standards reflect prevailing norms of practice and are guides in determining the nature and extent of the duty to investigate:

Defense counsel should conduct a prompt investigation of the circumstances of the case and *explore all avenues leading to facts relevant to the merits of the case* and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.

ABA STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, § 4-4.1 (3d ed. 1993) (emphasis added); *Mitchell*, 132 Idaho at 279-80, 971 P.2d at 732-33. In assessing the reasonableness of counsel’s investigation, we consider not only the quantum of evidence known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins*, 539 U.S. at 527; *Strickland*, 466 U.S. at 691; *State v. Mathews*, 133 Idaho 300, 307, 986 P.2d 323, 330 (1999) (“counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”). Moreover, counsel is bound to make reasonable efforts to obtain and review material that the prosecution will probably rely on as evidence. *Rompilla*, 545 U.S. at ___, 125 S. Ct. at 2460.

Murphy, 143 Idaho at 145-46, 139 P.3d at 747-48. *Murphy* contends that her trial counsel violated the foregoing standards when he failed to retain a forensic pathologist in advance of trial; or, at a minimum, move for a continuance and seek assistance from a forensic pathologist once it became apparent that Dr. Patterson’s opinion had changed from indeterminate to

homicide. Applying the *Strickland* standard, the district court held that Murphy's trial counsel was not deficient for failing to consult a forensic pathologist prior to trial given the fact that Dr. Patterson's opinion as to the manner of death was indeterminate until the day he testified. As to the failure to request a continuance, we note that the district court proceeded with the understanding that this Court had already held that Murphy's counsel was deficient in his performance in not requesting a continuance when he discovered that Dr. Patterson's opinion would change. This Court previously stated, "Under our standard for adequate performance, Murphy's trial counsel rendered deficient service when he failed to ask for a continuance to consult with a pathologist after it became clear that the state's expert would change his manner-of-death opinion from indeterminate to homicide." *Murphy*, 143 Idaho at 147, 139 P.3d at 749. Therefore, we will address the first prong of *Strickland* only as to whether Murphy's trial counsel was deficient in failing to retain a forensic pathologist prior to trial.

In order to assess whether Murphy's trial counsel was deficient in failing to retain a forensic pathologist prior to trial, we must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The affidavit of Murphy's counsel states, in pertinent part:

That during the defense of Mrs. Murphy, I prepared for trial assuming that Dr. Patterson would testify consistent with [his] testimony given to the grand jury in December of 1999, and the opinions given in his original pathology report. In each of those matters, he concluded that the cause of death to Mr. Jim Murphy was "indeterminate."

Murphy, 143 Idaho at 146, 139 P.3d at 748. Murphy argues that "given the importance of a finding of suicide, as well as the fact that the State's own expert could not initially determine whether Mr. Murphy's death was the result of a homicide or suicide, a reasonable defense attorney would investigate further in an effort to uncover independent evidence that the death was actually the result of a suicide thereby, proving his client's innocence." Murphy contends that an independent forensic pathologist would have allowed the defense an opportunity to challenge Dr. Patterson's credentials, methodology, and ultimate conclusions. Murphy also argues that there was no tactical reason for counsel not to have engaged a forensic pathologist. These contentions, however, fail in light of the relevant standards. Murphy's contentions fail to "eliminate the distorting effects of hindsight" and fail to consider counsel's perspective at the

time. *Strickland*, 466 U.S. at 689. Murphy fails to consider the powerful effect of pointing out to the jury the fact that the State's own expert witness could not, with the requisite degree of scientific or medical certainty, support the State's theory of the case. Murphy's trial counsel proceeded with the assumption that Dr. Patterson's testimony at trial would be consistent with his testimony at the grand jury proceeding. Given the State's burden of proving homicide beyond a reasonable doubt, relying on the State's own expert to create doubt was reasonable. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless these decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). Defendants are constitutionally entitled to competent representation, not perfect or optimal representation. Ineffective assistance is not established merely by showing that there are things that counsel could have done better. "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992). We will not second guess a reasonable trial strategy employed by Murphy's trial counsel based upon his perspective at the time.

Furthermore, were we to find that Murphy's trial counsel was deficient in failing to retain a forensic pathologist, we cannot say that counsel's decision actually resulted in prejudice as further discussed below. As set forth in *Strickland*, "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693.

B. Prejudice

As noted, the district court proceeded under the assumption that this Court had previously determined that Murphy's trial counsel was deficient in failing to request a continuance. Therefore, we will next address whether the deficiency resulted in prejudice. Murphy must prove by a preponderance of the evidence that there was a reasonable probability that, but for her trial counsel's failure to request a continuance, the outcome of the trial would have been different. *See Aragon*, 114 Idaho at 761, 760 P.2d at 1177. Murphy is not required to prove that her trial counsel's errors more likely than not altered the outcome of the case. *See Strickland*, 466 U.S. at 693. Rather, "[a] reasonable probability is a probability sufficient to undermine

confidence in the outcome of the criminal trial.” *Id.* at 694; *Knutsen v. State*, 144 Idaho 433, 443, 163 P.3d 222, 232 (Ct. App. 2007). In making its determination as to whether trial counsel’s deficient performance resulted in prejudice, “a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.” *Strickland*, 466 U.S. at 695; *Milburn v. State*, 130 Idaho 649, 653, 946 P.2d 71, 75 (Ct. App. 1997).

In drawing its conclusions, the district court analyzed Murphy’s claim under the assumption that a short continuance may have been granted to allow trial counsel to consult with a forensic pathologist. The district court concluded that if Dr. Grey’s testimony had been admitted and considered by the jury, the outcome of the trial would not have been different.⁶ We agree.

Murphy’s argument that the outcome of the trial would have been different is centered, as were Dr. Grey’s reports, on the degree of certainty with which Dr. Patterson testified that James Murphy was the victim of homicide. Murphy argues that “[h]ad Dr. Grey been timely retained, although he likely would *not* have testified to a reasonable degree of certainty that Mr. Murphy had committed suicide, he could have testified that, in his own expert opinion, Dr. Patterson’s ultimate opinion as to the manner of Mr. Murphy’s death (homicide) was unsupported by the forensic evidence and that, the manner of death in this case cannot be scientifically determined.” (emphasis in original) The district court evaluated the experts’ reports, analyzed significant differences, and read the trial transcript. As to the totality of Dr. Patterson’s testimony, the district court found that Dr. Grey had isolated certain statements made by Dr. Patterson rather than considering his testimony as a whole. In order to address whether the district court correctly applied the *Strickland* standard, we will review the district court’s findings and whether they support its ultimate conclusion.

The district court noted that Dr. Grey took issue with Dr. Patterson’s characterization of the nature of the wound. The district court found that Dr. Patterson and Dr. Grey both agreed that this was a “close contact range wound.” Dr. Grey appeared to disagree with Dr. Patterson’s

⁶ Murphy contends that the district court appears to have applied a “preponderance of the evidence” standard rather than the required “reasonable probability” standard under *Strickland*. While the district court perhaps used the phrase “preponderance of the evidence” in a confusing manner, it is clear that the court found that Murphy had failed to prove by a preponderance of the evidence that there was a reasonable probability that, but for her trial counsel’s failure to request a continuance and/or retain a forensic pathologist, the outcome would not have been different.

testimony that the range of fire was likely between 2 and 2.5 inches from the point of entry of the bullet. However, both experts agreed that a “contact wound” involves the muzzle of the weapon being in direct contact with the tissue or skin. The experts agreed that the muzzle was not in contact with the skin or tissue when the weapon was fired. Therefore, the district court found that Dr. Patterson’s estimate of 2 to 2.5 inches was not unreasonable, and further found that Dr. Grey did not explain why this distance would be inconsistent with a “close contact range wound.” These findings are supported by the record.

Dr. Patterson testified that a close contact wound is determined by the stippling pattern. Dr. Grey first asserted that stippling was not documented by the photographs he reviewed, but then later stated that the photographs did not show “any *significant* stippling” (emphasis added). The district court found the statement by Dr. Grey, that he could not see any *significant* stippling, implied that there was *some* stippling.

Dr. Grey also contended that Dr. Patterson testified that the gun was outside of the decedent’s lips, which would be inconsistent with Dr. Patterson’s testimony regarding the stippling pattern. The district court, however, noted that Dr. Patterson used the word “beyond” rather than outside. This contention was based upon Dr. Patterson’s responses during cross-examination where defense counsel was using the gun to demonstrate what he understood Dr. Patterson’s testimony to be regarding the distance of the muzzle from the decedent’s skin or tissue. Dr. Grey argued that the lack of any searing, sooting, or stippling on the lips or teeth was inconsistent with Dr. Patterson’s conclusion that the muzzle was outside the lips. However, Dr. Patterson understood the import of stippling, searing, and sooting and testified during cross-examination that the muzzle was “[j]ust beyond it [the lip] so it would not scorch or sear the lip.” The district court also noted that Dr. Patterson had previously testified on direct examination regarding the location of the gun when he stated,

Well, we’ve got no evidence of stippling on the lips. We know that the muzzle was probably within the lips, inside the lips. . . . [T]he muzzle of the barrel was just inside the mouth, passed the lips, probably just outside the teeth. There were no stippling marks on the teeth either.

Therefore, the district court looked at the entirety of Dr. Patterson’s testimony and determined that his testimony was not inconsistent.

Dr. Grey also took issue with Dr. Patterson’s use of the term “blowback.” Dr. Patterson pointed out in his rebuttal to Dr. Grey’s first report that this argument was about terminology.

Dr. Grey defined blowback as “a function of the expansion of tissues from the passage of the bullet and/or hot gasses and blast effects.” Dr. Patterson used the term as a means to describe the process of “backscatter” of blood, tissue, and other fluids that are ejected back on and/or into the weapon after the bullet strikes the body surface. Officer Chambers, the State’s firearms expert, reconciled these definitions in his testimony as to the definition of blowback on a weapon:

When you have a discharge of a weapon, you have the gases that are traveling with the bullet. When you have a contact wound, when you have a hard contact wound, in other words, pushing of the weapon up against the skin, these gases are pushed into the wound track and because of the vacuum that is kind of created within this barrel as the bullet goes down, it will suck part of the tissue, the blood and the bone back into the weapon as well as a possibility of getting some on the outside of the barrel.

Both Dr. Patterson and Officer Chambers testified consistently as to the definition of blowback and none was discovered on the weapon. Dr. Grey contended that the absence of blowback “in a small caliber revolver wound is not surprising and certainly can not be used to determine the range of fire.” However, the testimony regarding “blowback” did not specifically refer to the range of fire. Furthermore, Dr. Patterson also testified that he would not expect much blowback, if any, in a low caliber weapon such as a .22 caliber revolver. The district court noted that Dr. Grey agreed with the proposition that there would be little to no evidence of blowback given the type of weapon used. Therefore, any discrepancy between the experts was due to semantics. However, the district court determined that the experts agreed as to the ultimate conclusion that there would be little to no evidence of blowback, and there was none.

In his first report, Dr. Grey stated:

Dr. Patterson’s claim that the GSR results prove this was a homicide is nonsense. Even if one accepts the validity of the sampling and testing, the results only indicate the decedent’s hands were exposed to gun smoke. Any number of interpretations of the meaning of that finding can be legitimately offered.

In Dr. Grey’s second report, he stated:

I agree that if one accepts that the sampling, evidence handling and testing for GSR was performed appropriately and according to standards, if residue was present only on the right and left palms, it would be atypical for suicide and that the more likely pattern is residue on the back of at least one hand.

The district court noted that the evidence indicated that GSR was only found on the palms of James Murphy’s hands. No GSR was discovered on the back of either hand, nor was there any

evidence that the GSR was improperly collected, sampled, handled, or tested. The district court found Dr. Grey's concession to be very significant because if the gun had been discharged by James Murphy, one would expect to find GSR on the back of at least one hand.

Dr. Grey also contested Dr. Patterson's explanation of the absence of cylinder gap marks. Dr. Grey noted that Dr. Patterson was not a certified firearms expert and did not request any test firings of the weapon. However, as the district court noted, Dr. Patterson had extensive knowledge and training in firearms and his testimony regarding the GSR findings and the functioning of the weapon were corroborated by Officers Chambers and McDaniel.

Dr. Grey disputed Dr. Patterson's opinion that the decedent was lying down when he was shot. Dr. Patterson believed that James Murphy was lying down because of the location of the gun and the location of the blood on the victim. Dr. Grey argued that it was pure speculation that if James Murphy shot himself the gun would be thrown away from the body. However, Dr. Patterson testified that in the case of transection of the midbrain, as was the case here, "if he has a weapon in his hand, the weapon will typically be thrown backwards or fall immediately where he's at." Dr. Patterson did concede in his rebuttal report that he may have over-emphasized the location of the gun. The location of the blood on the victim indicated to Dr. Patterson that the decedent was lying down when he was shot because the secretions on the hair, mustache, and beard were not dripping down and there was no blood in the beard. As the district court pointed out, however, Dr. Patterson ultimately testified that he could not say with any degree of certainty that the decedent was laying supine or sitting up when he was shot.

Dr. Grey also contended that Dr. Patterson's explanation of the blood discovered on James Murphy's thigh went beyond his area of expertise. Dr. Grey argued that Dr. Patterson was merely speculating that the blood on James Murphy's thigh resulted from a nose bleed caused by the blow with the frying pan. The district court found that Dr. Patterson's opinion regarding the blood on the thigh was only in the context of whether James Murphy was sitting up or lying down but was not determinative of the issue of suicide or homicide. These findings are supported by the record.

The district court took up Dr. Grey's contention that Dr. Patterson improperly offered an opinion that the victim was unconscious at the time he received the gunshot wound. Dr. Grey argued that the nose injury was "undocumented;" however, the district court dismissed this contention as unsupported by the trial evidence. There was evidence presented that Murphy

struck James Murphy in the face with a cast iron frying pan. There was scientific evidence of injury to James Murphy's nose and forehead due to a blunt object. When asked what the effects would be of being struck by a frying pan, Dr. Patterson responded that loss of consciousness could occur. Dr. Patterson also testified that alcohol intoxication could make an individual more susceptible to the effects of a blunt force injury to the head, and Dr. Grey concurred. Dr. Grey contended that Dr. Patterson simply testified with too high a degree of certainty that James Murphy was unconscious because Dr. Patterson did not observe the injury at the time it occurred and had not observed the effects of alcohol on the decedent. The district court determined that while Dr. Patterson had not observed the actual infliction of the injury, he did observe the damaged condition of the frying pan. Thus, the district court found that based on these observations, along with Murphy's own incriminating statements concerning the blow with the frying pan, it was reasonable to infer that the blunt force was sufficient to cause unconsciousness and that the decedent was unconscious for a period of time.

The district court next addressed Dr. Grey's argument that Dr. Patterson testified with too much certainty as to the time of death. Dr. Grey argued that Dr. Patterson conveyed to the jury that the PMI (post-mortem interval) could be determined with a great level of accuracy. Dr. Patterson used the PMI to estimate the time of death between 5:00 and 10:00 PM. However, as the district court noted, on cross-examination, Dr. Patterson admitted that there are several factors that go into a PMI determination, not all of which were available to him. He further admitted that an estimation of the time of death is quite variable.

The district court also found that Dr. Grey was not able to exclude the possibility that Dr. Patterson's opinion as to the manner of death was correct. Furthermore, the district court found that Dr. Grey did not offer an opinion that the manner of death was suicide or indeterminate. The district court also noted that there was other evidence, consisting of the testimony of Jimmy and Olive Murphy and also statements of Alisha Murphy to law enforcement and a social worker "which clearly implicated her in the death of James Murphy." Based on these findings, the district court determined that Murphy had not met her burden to prove prejudice and, therefore, denied her application.

Dr. Grey took issue with several of the opinions offered by Dr. Patterson at trial. As shown above, these contentions were individually considered by the district court. Evidence supports the district court's ultimate finding that Dr. Grey did not offer an opinion that the

manner of James Murphy's death was suicide or indeterminate. Nor did Dr. Grey exclude the possibility that Dr. Patterson was correct in his opinion that James Murphy was the victim of homicide. The district court found Dr. Grey's concession regarding GSR, that findings of GSR only on the palms and not on the back of at least one hand is atypical of suicide, to be of considerable significance. Considering the record as a whole, i.e. reviewing the pathologists' reports as well as the other evidence submitted at trial, the district court determined that there was not a reasonable probability that the outcome of the trial would have been different if defense counsel had obtained the service of a pathologist. We agree.

Murphy contends that had she been able to discredit the testimony of Dr. Patterson, she may have been able to raise reasonable doubts in the jurors' minds in light of the children's change in story. While Dr. Grey may have been able to challenge Dr. Patterson's credentials, methodology, and the degree of certainty to which he expressed his conclusions, Dr. Grey did not make any conclusions himself that would greatly affect the testimony of the other witnesses. We cannot review Murphy's claim of prejudice in a vacuum. Rather, a claim of ineffectiveness of counsel must be reviewed based on the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695; *Milburn*, 130 Idaho at 653, 946 P.2d at 75. The district court referred to the testimony offered by other witnesses and considered it in making its determination. We take a moment to review this testimony in considering the totality of the evidence before the jury.

Jimmy and Olive Murphy both testified at Alisha Murphy's trial and implicated her in the death of her husband, James Murphy. Both testified that on the night of their father's death, Murphy entered their bedroom and began to strangle Jimmy with a belt. Olive testified that Murphy threatened Olive with the same treatment unless she turned over. James Murphy entered the room and James and Alisha began fighting. The fighting eventually moved to the kitchen. Jimmy testified that he went downstairs to check on the Christmas tree at Olive's request. After he went back upstairs, the sounds of fighting stopped. Jimmy testified that Murphy came upstairs and walked in the direction of the bathroom and her bedroom. She walked back downstairs, and shortly thereafter Jimmy went downstairs to find her in the kitchen. He testified that he saw Murphy kneeling down next to his father, who was lying on the kitchen floor. Jimmy testified that he saw Murphy place a gun in James Murphy's hand and point it toward his face. Jimmy ran back to his room when he heard a loud noise. Olive testified that she heard a

gunshot. Both children testified that Murphy told them that they were leaving. They also testified that they stepped over the body of James Murphy on their way to the vehicle. Olive testified that she saw Murphy place a gun in James Murphy's hand. Both children also testified that when they left, James Murphy was not moving or talking. Jimmy testified that the reason that he gave another account of the events of that evening was because his mother had threatened to "shoot [him] and stab [him] and cut [his] heart out if [he] did tell."

Both Jimmy and Olive testified that they first left the house in their father's truck, which Murphy drove into the ditch. Police officers corroborated this testimony at trial. They got out of the truck and left in their car. Murphy was eventually arrested that night for DUI. She told officers not to go to the house because James Murphy had guns and was not afraid to use them. Some officers did check the house that night but no one answered when they knocked on the doors and windows. She also told several officers and repeated several times that she had "beat [James] pretty good" and that she "wasn't going to get beat no more." One officer testified that Murphy told him that she had "beaten the crap out of [James] with a frying pan." Another officer testified that she observed Murphy "waiving her hands in the air" and putting her hands out in a position "[k]ind of like a gun, holding a gun."

After Murphy was released from jail the next day, she requested that the police escort her to her home to pick up her belongings. An officer testified that when he arrived he requested that she give him the key to the house so that he could neutralize the situation, but Murphy walked up to the door and unlocked it herself. The officer testified that he held the door open about 8 to 10 inches, crouched down, and called out to James. Murphy then said, "Oh, my God, there he is," and pushed the door open. However, the officer testified that the house was dark and that he could not see James until he was approximately three feet from his body. Other officers arriving at the scene also testified that they could not see James until approximately three feet from the body. Murphy subsequently asked the officer whether he thought James had killed himself. When the officer responded that he did not know, she asked whether it was a homicide and whether she was a suspect. She asked several officers whether she was a suspect.

When Murphy was subsequently interviewed, she indicated that James had shot himself with a .22 caliber revolver before police had informed her of the cause of death. She also wanted to know whether Jimmy had stated that James was lying on the floor when they left. She inquired as to whether the police found any gunpowder on James' hands. While she was being

interviewed and before any officers had said anything about their theory of the case, she indicated to the police, “in my mind I believe that you think that I hit him with the flipping frying pan and went back and shot him.”

There was also testimony elicited from a social worker assigned to work with Murphy’s family. She indicated that she had noticed that Jimmy and Olive had difficulty around Christmas time every year. During one of the yearly update meetings with Murphy, Murphy “demanded to know what the children were saying happened on the night of December 18th, 1995.” At a later meeting, the social worker stated that she knew what had happened on December 18, 1995, to which Murphy responded, “I didn’t mean to do it. I thought he was already dead.”

In reviewing the totality of the evidence, including the pathologists’ reports, we cannot say that the district court erred in denying Murphy’s application for post-conviction relief. As the United States Supreme Court recognized in *Strickland*:

Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by the errors than one with overwhelming record support.

Strickland, 466 U.S. at 695-96. We conclude that there was overwhelming record support for the district court to determine that when considering the record as a whole, there was not a reasonable probability that the outcome of the trial would have been different if a pathologist had been employed to aid the defense.

III.

CONCLUSION

We conclude that Murphy’s trial counsel did not render deficient performance when he failed to retain a forensic pathologist in advance of trial. We agree with the district court’s determination that the outcome of Murphy’s trial would not have been different had trial counsel requested a continuance to consult a forensic pathologist. Therefore, the district court was correct in dismissing Murphy’s application for post-conviction relief because she failed to prove her allegations of ineffective assistance of counsel, i.e. both prongs of *Strickland*, by a preponderance of the evidence. The district court’s order dismissing Murphy’s application for post-conviction relief is affirmed.

Chief Judge LANSING and Judge PERRY, **CONCUR.**